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| Jackson Lewis LLP 58 South Service Road Suite 410 Melville, New York 11747 Tel 631.247-0404 Fax 631.247-0417 www.jacksonlewis.com | ATLANTA, GA BOSTON, MA CHICAGO, IL DALLAS, TX GREENVILLE, SC HARTFORD, CT LONG ISLAND, NY | LOS ANGELES, CA MIAMI, FL MINNEAPOLIS, MN MORRISTOWN, NJ NEW YORK, NY ORLANDO, FL PITTSBURGH, PA | SACRAMENTO, CA SAN FRANCISCO, CA SEATTLE, WA STAMFORD, CT WASHINGTON, DC REGION WHITE PLAINS, NY |
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May 17, 2005

VIA FACSIMILE (202-383-6610)
AND FIRST CLASS MAIL

Erik T. Koons, Esq.
 Howrey Simon Arnold & White, LLP
 1299 Pennsylvania Ave. N.W.
 Washington, D.C. 20004

Re: Jeff Schmidt v. American Institute of Physics
Case No.: 04:3774 (AW)

Dear Mr. Koons:

We write in response to your May 6, 2005 correspondence objecting to Defendant's Responses to Plaintiff's First Request for the Production of Documents ("Defendant's Responses"). Please be advised that Defendant acted in good faith in propounding its responses and objections to Plaintiff's document production requests and in setting forth its objections to Plaintiff's Requests.

For sake of clarity, we will respond to Plaintiff's objections to Defendant's responses in seriatim:

Request No. 1: At this juncture, Defendant has produced the "documents referring or relating to evaluations and/or the performance of Jeff Schmidt, the quality of his work, and any disciplinary actions proposed, contemplated and/or undertaken relating to Jeff Schmidt", including documents in the possession of Defendant's Human Resources Department. While Defendant believes that it provided all documents responsive to this Request, it is undertaking an additional search to ensure that all responsive documents have been produced. If additional documents are located, they promptly will be produced in accordance with Defendant's obligations under the Federal Rules of Civil Procedure. Please also be advised that Plaintiff's assumption that Defendant withheld documents regarding Mr. Schmidt's "exit interview" is erroneous. As Mr. Schmidt well is aware, an exit interview was not conducted prior, or subsequent, to Plaintiff's discharge.

Request No. 4: The bounds of discovery are not unlimited. Once a party from whom discovery is sought raises a well-founded objection, it is the party seeking discovery who must demonstrate the relevance of the information sought. Plaintiff has not done so with regard to Request No. 4, which seeks disclosure of "all documents referring or relating to evaluations



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and/or the job performance, quality of work, work place activities, compensation, work requirements and any disciplinary actions with regard to Jean Kumagai, Bert Schwarzchild, Toni Feder and Paul Elliott." The requested information concerns employees who are not parties to the instant action and is not relevant to Plaintiff's claim that he was discharged in retaliation for complaining about Physics Today's hiring practices. Unlike Plaintiff, Ms. Kumagai and Mr. Elliott voluntarily resigned from Defendant's employ. Ms. Feder and Mr. Schwarzchild currently remain employed with Defendant. None are similarly situated to Plaintiff. Accordingly, Defendant requests that Plaintiff demonstrate how production of the information requested in this Request is reasonably calculated to lead to the discovery of admissible evidence.

Request No. 6: This Request purports to seek "all documents referring or relating to any diversity, equal opportunity or affirmative action training proposed, contemplated or offered by AIP to any of its employees." It is overbroad, unduly vague and not reasonably calculated to lead to the discovery of admissible evidence. Once again, the requested information is not relevant to Plaintiff's claim that he was discharged in retaliation for complaining about the alleged hiring practices at Physics Today.¹ Notwithstanding Defendant's objections, Defendant has responded fully to this Request, with the exception of producing Employee Handbooks in existence prior to the Handbook tendered in response to Request No. 11 (to the extent that said Handbooks even contain information responsive to Request No. 6). Defendant agrees to produce Defendant's 1979, 1990, 1993, 1996 and 1999 Employee Handbooks to Plaintiff. Said documents will be produced under separate cover. To the extent that Plaintiff believes that Defendant's Affirmative Action Plans are responsive to this Request, see Defendant's response to Plaintiff's objections to Requests No. 7 and 9 set forth below.

Request No. 7: In addition to seeking confidential information about individuals who are not parties to this action, this Request, seeks "documents referring or relating to all persons applying for positions at AIP including, but not limited to, the number of applicants by race, gender, religious affiliation, national origin, sexual orientation or other demographic category and the disposition of their applications." It is overbroad, unduly vague and not reasonably calculated to lead to the discovery of admissible evidence. Further, Defendant continues to assert its right to withhold such documents on the grounds of the critical self-analysis privilege.

Plaintiff claims that he is entitled to this broad category of documents because, while employed at AIP, he allegedly "asserted that AIP was deficient in matters relating to affirmative action and equal employment opportunities and practices". Accordingly, Plaintiff believes that he now allegedly is permitted to conduct a wide ranging review of all documents maintained by Defendant from 1990 to the present relating to this Request. Plaintiff is mistaken. While Plaintiff is correct that that it is Defendant's position that any complaint made by Plaintiff was unfounded, Plaintiff is not entitled to engage in a unfettered "fishing expedition" to obtain access to documents that he did not rely upon in making his unfounded "complaint." Moreover, given that 1) he was employed by Defendant solely in its Physics Today department; 2) Plaintiff alleges he did not complain about Defendant's hiring practices until in or around 1996; and, 3)

¹ It is Defendant's understanding that Plaintiff never complained about AIP's hiring practices in its other divisions.



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he was discharged in May 2000, Plaintiff is not entitled to discovery of documents relating to AIP's affirmative action plans and equal employment opportunity from 1990 to the present. Further, Plaintiff made no complaint concerning "religious affiliation, sexual orientation or other demographic category", and, as such, cannot obtain documents relating thereto in discovery.

Accordingly, if Plaintiff provides, under oath, a list of documents he reviewed while employed by Defendant, and upon which he relied upon in engaging in his so-called "protected activity" which are covered by this Request, Defendant will consider producing those documents subject to a protective order.

Request No. 8: Throughout his employment with Defendant, Plaintiff was employed as an Editor/Senior Editor in AIP's Physics Today department. He held no other position with Defendant, and worked in no department other than Physics Today. Accordingly, all documents "referring or relating to the qualifications required or considered for AIP employees including, but not limited to, the position of staff editor at Physics Today" is overbroad, unduly vague and not reasonably calculated to lead to the discovery of admissible evidence. Defendant previously produced Plaintiff's job description. Nevertheless, to facilitate discovery, Defendant will produce, under separate cover, job descriptions it has on file for Physics Today editor positions.

Request No. 9: In Request No. 9, Plaintiff seeks "all documents referring or relating to internal or external reports relating to diversity or equal opportunity practices of AIP or information submitted to the federal government or any other person or entity referring or relating to the diversity or equal employment opportunity practices of AIP including, but not limited to, the 1996 Affirmative Action Program for American Institute of Physics and all documents relating to the July 11, 1996, memorandum from Melinda Underwood to Theresa C. Braun detailing female and minority utilization at AIP." For the reasons stated above in Defendant's response to Plaintiff's objections to Request No. 7, Defendant objects to producing documents responsive to this Request. However, if Plaintiff provides, under oath, a list of documents he personally reviewed while employed by Defendant, and upon which he relied upon in engaging in his so-called "protected activity", Defendant will consider whether it will produce those documents subject to a protective order.

Request No. 11: As noted above, Defendant will produce, under separate cover, Employee Handbooks issued in 1979, 1990, 1993, and 1996. Defendant already produced the Employee Handbook it issued in 1999. Defendant is not producing the Handbook it issued in 1972, because Plaintiff was not employed by Defendant when that Handbook was in effect.

Request No. 14: Defendant relies upon the objections it asserted in response to Request No. 14, and those reasons articulated above in Defendant's response to Plaintiff's objections to Requests No. 7 and 9. However, as set forth above, if Plaintiff provides, under oath, a list of documents that he relied upon in engaging in allegedly "protected activity" which relate to "Physics Today's proposed, contemplated or actual decision to recruit and or not recruit minority and/or women employees", Defendant will consider producing said documents subject to a protective order.



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Request No. 16: Defendant has produced all policies in effect "referring or relating to AIP or Physics Today's policy regarding carrying over unused vacation time to a subsequent year". As set forth above, Defendant will produce Employee Handbooks in effect for years prior to 2000. In addition, Defendant agrees to produce documents regarding the decision "to permit Paul Elliott to carry over to the year 2000 his unused 1999 vacation time" under separate cover, to the extent said documents can be located. Please be advised that Defendant already has produced all documents in its possession regarding the alleged "decision not to permit Dr. Schmidt to carry over his vacation time for that same period."

Request No. 18: Although said documents are as easily available to Plaintiff as to Defendant, Defendant has produced the documents that it received from, or sent to, the Prince George County Commission on Human Rights. As Plaintiff should be aware, any documents or correspondence exchanged between Defendant and counsel with regard to Plaintiff's litigation before the Prince George County Commission on Human Rights are protected by the attorney client privilege, and as attorney-work product or documents prepared in anticipation of litigation. Further, Defendant is not required to produce a privilege log with regard to communications or documents exchanged between AIP and counsel after Mr. Schmidt commenced litigation.

Request No. 24: For the reasons set forth above in Defendant's responses to Plaintiff's objections to Requests No. 7, 9 and 14, production of "all documents referring or relating to employee salaries or compensation including, but not limited to, any salary differentials between minority or women personnel, and non-minority or non-female employees and AIP's decision to award Jean Kumagai a salary increase effective on or about June 1, 1997" is objectionable. If Plaintiff provides, under oath, a list of Defendant's documents he personally reviewed while employed by Defendant, and upon which he relied in engaging in his alleged "protected activity" with regard to "employee salaries or compensation including, but not limited to, any salary differentials between minority or women personnel, and non-minority or non-female employees and AIP's decision to award Jean Kumagai a salary increase effective on or about June 1, 1997," Defendant will consider producing said documents subject to a protective order.

Request No. 25: Request No. 25 is objectionably overbroad as Defendant is unclear as to what Plaintiff means by "documents referring or relating to Jeff Schmidt's activities relating to employee diversity at Physics Today." Regardless, Defendant provided all documents that it was able to identify which concern what Defendant believes to be Plaintiff's "activities relating to employee diversity at Physics Today." Defendant has not withheld documents responsive to this Request. If Plaintiff believes that Defendant has omitted documents responsive to this Request, he should identify those specific documents so that Defendant can consider production thereof.

* * *

We also are in receipt of your May 13, 2005 correspondence responding to Defendant's objections to Plaintiff's responses to Defendant's document production requests. We believe your response was inappropriate and does not address Defendant's concerns.



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Plaintiff has not identified which of the over 2000 documents he produced are responsive to each separate Request. We cannot ascertain whether Plaintiff's objections to Defendant's Requests are valid without proper categorization of documents. By responding to our objections, you have taken the position that Plaintiff complied with Rule 34 because he produced documents as "kept in the ordinary course of business." Plaintiff was not operating as a "business." This clause of Rule 34(b) was not meant to apply to him. Accordingly, we again request that Plaintiff specifically categorize which documents are responsive to each particular request. Further, your representation that all documents are "responsive" to Request No. 1 (which is not indicated in Plaintiff's Responses) does not absolve Plaintiff of the obligation to indicate which documents are responsive to other Requests. As you are aware, discovery is due to close on June 27. Accordingly, we expect that we will receive document production responses from Plaintiff that comply with Rule 34 by May 20, 2005.

Finally, in our May 2, 2005 correspondence to you, we explicitly demanded that Plaintiff's responses to Defendant's Interrogatory and Document Production Requests be received no later than May 9, 2005. In your response to that letter, you stated that I would receive those responses "early" in the week of May 9. I never authorized such an extension. We did not receive Plaintiff's document production responses until Thursday, May 12, 2005. Moreover, we still have not received Plaintiff's Interrogatory responses and, again, never authorized an extension of time to respond thereto. We expect to receive Plaintiff's Interrogatory responses no later than Friday, May 20. If we do not receive them by that date, we will consider Plaintiff to have waived his objections thereto.

Very truly yours,

JACKSON LEWIS LLP

Wendy J. Mellk

A handwritten signature in black ink. The signature is fluid and cursive, appearing to read "Wendy J. Mellk". Above the signature, the text "Very truly yours," is written in a smaller, printed font. Below the signature, the text "JACKSON LEWIS LLP" is printed. The entire block of text is centered on the page.

WJM/dc



Attorneys at Law

Representing Management Exclusively in Workplace Law and Related Litigation

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| Jackson Lewis LLP 1000 Woodbury Road Suite 402 Woodbury, New York 11797 | ATLANTA, GA BOSTON, MA CHICAGO, IL DALLAS, TX GREENVILLE, SC HARTFORD, CT LONG ISLAND, NY | LOS ANGELES, CA MIAMI, FL MINNEAPOLIS, MN MORRISTOWN, NJ NEW YORK, NY ORLANDO, FL PITTSBURGH, PA | SACRAMENTO, CA SAN FRANCISCO, CA SEATTLE, WA STAMFORD, CT WASHINGTON, DC WHITE PLAINS, NY |
| Tel 516 364-0404 Fax 516 364-0468 www.jacksonlewis.com | | | |

PRIVILEGED & CONFIDENTIAL**FAX**

To: Erik T. Koons, Esq.
Company: Howrey Simon Arnold & White, LLP
Fax: 202-383-6610 **Tel #:**
From: Wendy J. Mellk, Esq.
Sender: Kathi Hanrahan
Subject: Jeff Schmidt v. AIP
Date: May 13, 2005
Client/Matter #: 49893
Pages: 6
Original: X Will Follow _____ Will Not Follow

MESSAGE: Please see the attached.

2005 MAY 17 PM 5:12

Please contact Diane Carroll if there are any problems with this transmission.

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